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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 475 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1973. A petition for rehearing was denied on April 4, 1973. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 2, 1973. The petition was filed on June 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof of *scienter* is required for the offense of impeding a federal officer engaged in the performance of his official duties (18 U.S.C. 111).

2. Whether the government failed to prove that the stolen property was moving in foreign commerce at the time of the theft.

3. Whether the district court erred in instructing the jury with respect to petitioner's acquittal on the conspiracy count.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of the knowing possession of 220,000 pounds of tin ingots stolen from foreign commerce, in violation of 18 U.S.C. 659, and of interference with a federal officer engaged in the performance of his duties, in violation of 18 U.S.C. 111. At the close of the evidence, petitioner was acquitted by the court of a third charge of having conspired to commit the theft, in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to consecutive prison terms totaling seven and one-half years, and fines totaling $10,000. The court of appeals affirmed (Pet. App. 1a–12a; 475 F. 2d 157).

On August 22, 1970, approximately 270,000 pounds of tin ingots, valued at $400,000, arrived at Newark, New Jersey after having been shipped from Thailand

[1] Nine defendants were originally named in the indictment. One was a fugitive at the time of the trial; three pleaded guilty; one was acquitted at the close of the government's case; and three were tried with petitioner and convicted as charged.

(Tr. 1493–1494). Within two days, the tin had been unloaded and stored in an International Terminal Operators (I.T.O.) warehouse in Newark by an agent for Phillips Brothers, the importer and holder of the bills of lading (Tr. 382–392, 2734). On August 26 and 27, Phillips Brothers issued delivery orders authorizing its customers to pick up their tin purchases from the I.T.O. warehouse, and some of the shipment was delivered to customers pursuant to these orders (Tr. 289–294, 2742–2746).

On August 28, 1970, one Mieliz (a fugitive co-defendant in the case) and three other persons illegally removed the remaining tin from the warehouse and loaded it into trucks which they had leased previously (Tr. 412, 523, 530, 578, 603–608). The trailers containing the stolen ingots were unloaded during the evening and the next morning in a garage in a residential area of Newark (Tr. 605–606, 688–692).

On August 31, three of the co-defendants, Sherman, Friedlander, and Bogin, who testified as a government witness, arranged for the sale of the tin to co-defendants Ira and Emanuel Zuckerman (Tr. 1753–1755). Bogin and Sherman were to pick up the tin (Tr. 1755–1756). They and Friedlander drove two vans to petitioner's store in Newark. Bogin waited with the trucks, while the other two went inside the store. Shortly thereafter, they emerged with two other men, who got into the trucks and drove off (Tr. 1757–1761). Bogin waited across the street from petitioner's store for the vans to return with the tin, while Friedlander and Sherman re-entered petitioner's store.

Friedlander, Sherman, and petitioner went in and out of the store together several times while Bogin waited (Tr. 1763, 1785).

As these events took place, the garage containing the ingots was under FBI surveillance, as the result of information from a confidential informant (Tr. 1367–1369). At about 11:15 a.m., two vans arrived at the garage; and at the same time, co-defendant Tremarco drove up in an automobile and entered the garage. The two trucks were loaded and driven off, and Tremarco returned to his automobile (Tr. 1140–1143).

Special Agent Robert McCluan commenced surveillance of the vehicles and proceeded to follow Bogin's van on its circuitous route, travelling at about 35 to 40 miles per hour (Tr. 796–801). Eventually, the van passed the place where Bogin was waiting for it and slowed down. Bogin went out from the curb to meet the truck, but it continued past him, the driver honking the horn vigorously. Bogin saw a car (McCluan's) following the van closely (Tr. 1786–1790). At the same time, McCluan saw petitioner standing nearby, next to a green Lincoln sedan. As the van slowed down, petitioner looked at the van and then at McCluan, and got into the Lincoln (Tr. 802). Bogin looked across the street and observed that petitioner was no longer standing with Sherman and Friedlander, who were looking down the street in the direction which the truck had taken.

As agent McCluan continued to follow the van, petitioner, in the Lincoln, suddenly darted around the corner, directly into McCluan's path, and slammed on his brakes. Almost immediately, co-defendant Tre-

marco drove up on McCluan's left side, completely boxing him in and preventing him from following the truck (Tr. 802–804). Petitioner brought the Lincoln in front of McCluan's automobile and drove slowly down the street "popping" his brakes, so that McCluan was forced to brake continuously. Tremarco stayed at McCluan's left so that the agent's vehicle could not be maneuvered around the Lincoln. McCluan observed a radio microphone in petitioner's hand, close to his mouth, and a citizen's band antenna on the Lincoln. Eventually, petitioner drove off quickly down the street (Tr. 808–809, 892–893).[3] Friedlander then crossed the street and asked Begin whether he had seen "them take out the FBI car," explaining that the honking of the horn was a "prearranged signal" (Tr. 1789–1791, 1799).

Petitioner was named in three counts of the indictment. Count I charged the nine defendants with conspiracy to steal property, in violation of 18 U.S.C. 371. Count III charged the same nine persons with the knowing possession of property stolen from foreign commerce, in violation of 18 U.S.C. 659. In Count IV, petitioner and Tremarco were charged with assaulting, opposing, impeding, and interfering with Agent McCluan in the performance of his official duties, in violation of 18 U.S.C. 111.[4] As we have al-

[3] Count II charged the fugitive defendant Micliz with the theft of the tin.

[4] When Tremarco was apprehended, shortly thereafter, he was discovered also to have a radio transmitter and receiver in his automobile (Tr. 900).

ready noted, petitioner was acquitted of Count I by the court at the close of all the evidence. Counts III and IV were submitted to the jury with the instruction that petitioner had been "severed" as to the conspiracy count (Tr. 3556). The court's instructions included a detailed explanation of the elements of constructive possession (Tr. 3578–3580) and aiding and abetting (Tr. 3584–3585).

ARGUMENT

1. Petitioner contends that the courts below erred in holding that *scienter* is not an essential element of proof under 18 U.S.C. 111. While conceding that the Third Circuit, in holding that no *scienter* is required, follows the majority rule, petitioner argues that the better view would sustain a criminal conviction only upon proof that the defendant was aware that his victim was a federal officer engaged in the performance of his official duties.

Petitioner cites a number of cases which purportedly establish a conflict among the circuits with respect to the *scienter* requirement (*e.g.*, Pet. 22). However, a review of recent decisions reveals that every circuit which has considered the issue involved in the instant case holds that *scienter* is irrelevant in the indictment and in the proof at trial. *United States* v. *Maynard*, 452 F. 2d 1087 (C.A. 1); *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), cer-

tiorari denied, 404 U.S. 915; *United States* v. *Gaunt*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986 (dictum); *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9).

No circuit presently holds that *scienter* is invariably an element of 18 U.S.C. 111. In *United States* v. *Rybicki*, 403 F. 2d 599, the Sixth Circuit did rule that *scienter* is material in certain situations where the defendant's conduct is apparently a reasonable response to the acts of the unidentified officer. In that case the defendant threatened IRS officers who were in the process of seizing his truck. Other courts have suggested in dictum that in cases of that nature, and where the charge is resisting arrest, knowledge that the officer is a law enforcement officer (although not necessarily that he is a *federal* officer) may be material. *United States* v. *Clan*, *supra*, 421 F. 2d at 789–790; *United States* v. *McKenzie*, 409 F. 2d 983, 986 (C.A. 2); *United States* v. *Wallace*, *supra*, 368 F. 2d at 338. In all such cases, however, *scienter* is integrally related to the issue of *mens rea*, since the defendant in some circumstances may reasonably believe his use of force to be justified to protect persons or property if he is unaware of his victim's official authority and purpose. Accordingly, the Sixth Circuit applies the principle of *Rybicki* only upon a showing of "special facts." *United States* v. *Kiraly*, *supra*, 445 F. 2d at 292.

Petitioner's deliberate obstruction of Agent McCluan's automobile was entirely unprovoked and petitioner offers no possible justification for his inter-

ference with the agent's surveillance of the van. It is therefore clear that the instant case does not fall within the rationale of *Rybicki*. Since the circuits are in accord that, on facts such as those presented here, scienter is not an element of an offense under 18 U.S.C. 111, there is no occasion for further review.

2. Petitioner argues that the court of appeals erred in finding that the stolen tin ingots were moving in foreign commerce at the time of the theft. As we detailed in our statement of facts, the ingots were stolen from the warehouse where they had been stored by an agent for the consignee, Phillips Brothers, under the original bills of lading. Contrary to petitioner's claim, it was not contemplated that the named consignee would accept delivery of the entire load; rather, it was intended that Phillips Brothers would issue delivery orders on behalf of its customers, who would then take delivery of portions of the shipment (Tr. 1497, 1518–1523). Indeed, some of the ingots had been called for pursuant to such delivery orders prior to the time of the theft.

It is settled that goods moving in interstate or foreign commerce are subject to federal regulation until their "final delivery." *Wabash R.R. Co.* v. *Pearce*, 152 U.S. 179, 188. The only question is when "final delivery" is made, and the answer obviously depends on the particular facts of each case. Petitioner contends that the test is delivery to the ultimate consignee (Pet. 25), and by inference argues that Phillips Brothers was the ultimate consignee of the tin ingots and that delivery was effected when the ingots were warehoused. But the fact that Phillips Brothers was listed on the bill of lading as the consignee is not controlling. That is

illustrated by *United States* v. *Yoppolo*, 435 F. 2d 625 (C.A. 6), which presents facts quite similar to those in the instant case. There the whiskey had been shipped on a bill of lading listing the United States distributor of the liquor as the consignee. The liquor was warehoused pending delivery to the ultimate consignees for whom the liquor had been imported. The liquor was thereafter stolen during an intrastate shipment from the warehouse to the distributor's intended consignee. The Sixth Circuit nevertheless, upheld a conviction for theft of liquor from foreign commerce. See also *United States* v. *Maddox*, 394 F. 2d 297 (C.A. 4).

Similarly, here the jury could find that, until the authorized customers of Phillips Brothers presented their delivery orders and accepted the portions of the shipment which were assigned to them, the goods remained in foreign commerce. *Illinois Central R.R.* v. *Louisiana R.R. Comm.*, 236 U.S. 157, 163; *Rhodes* v. *Iowa*, 170 U.S. 412, 419, 426. See *Vance* v. *W. A. Vandercook Co.*, 170 U.S. 438, 444–445; *Brown* v. *Maryland*, 12 Wheat. 419, 447–448.[1]

3. Petitioner alleges that the district court erred in advising the jury that petitioner had been "severed" as to the conspiracy count of the indictment, and that

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[1] *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), has no application here. In that case, delivery was final and complete prior to the theft, since the ultimate consignee had accepted the goods and exercised exclusive dominion over them prior to the theft.

[2] As the court of appeals noted (Pet. App. 12a) and petitioner implicitly recognizes (Pet. 24–26), the issue whether the tin

the court's instruction in this regard improperly permitted the jury to consider conspiracy evidence in convicting petitioner on the substantive counts. At the close of the evidence, petitioner was acquitted by the district court of conspiracy to steal the tin ingots (Tr. 3250). Petitioner's counsel requested that the jury be advised of the acquittal, but the court refused, viewing such an instruction as improper and prejudicial and ruling that "severance" was the proper term (Tr. 3260–3264). The district judge also declined to instruct the jury to disregard certain evidence which was admitted against petitioner with respect to the conspiracy, since the evidence was relevant to the substantive counts as well (Tr. 3264–3265). Petitioner's counsel did not object to this ruling. Nor, following delivery of the charge (see Tr. 3556, 3572), did petitioner's attorney complain that the court had failed to marshall the evidence which might properly have been used against petitioner (Tr. 3592–3595).

Nevertheless, petitioner now asserts that the court's instruction [7] was ambiguous and permitted the jury to

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was moving in commerce at the time of the theft is a question of fact, not a matter of law. Accordingly, the trial judge presented the issue to the jury, with explicit instructions to determine whether the goods were part of a foreign shipment. The jury was charged that an affirmative finding on this issue was essential to a verdict of guilt (Tr. 3574–3577). The jury's verdict thus manifests a finding of fact that the tin ingots were moving in foreign commerce at the time of the theft. That determination is supported by the evidence, and is therefore controlling on appeal. *Glasser* v. *United States*, 315 U.S. 60, 80.

[7] "The defendant Gimelstob has been severed as to Count 1. You are not to speculate upon or draw any inference with re-

consider, as relevant to the substantive counts, evidence adduced against petitioner *and* his conspirators on the conspiracy count. But, a fair reading of the charge (Tr. 3572) does not support the inference that the court allowed the jury to evaluate any evidence against the co-defendants in deciding petitioner's guilt on the substantive charges. With respect to conspiracy evidence adduced against petitioner, the district judge had previously made clear his position that the evidence introduced against petitioner was equally applicable to both the conspiracy and substantive counts (Tr. 3264–3265). The proof of petitioner's association with the criminal venture (*e.g.*, Tr. 1785–1799) was highly relevant to the jury's determination of whether petitioner was in constructive possession of the stolen tin, or whether he had aided and abetted in that possession. Petitioner has made no showing that any evidence introduced against him at trial was inadmissible for the purpose of proving the substantive counts of the indictment. Likewise, he makes no specific showing of possible instances of the improper use against him of conspiracy evidence introduced in relation to his co-defendants. In the absence of any showing of prejudice, the contention merits no further review.

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spect to that severance. By reason of that serverance you are not to render any verdict as to the defendant Gimelstob with respect to Count 1 [Tr. 3556]."

* * * * * * *

"As you recall, Mr. Gimelstob has been severed as to Count I. Any evidence adduced as to Gimelstob with respect to the charges contained in Count I is not to be considered by you as against Mr. Friedlander, Mr. Sherman and Mr. Tremarco

Petitioner relies mistakenly upon such cases as *Schaffer* v. *United States*, 362 U.S. 511; *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2); and *United States* v. *Patrisso*, 262 F. 2d 194 (C.A. 2). *Schaffer* and *Patrisso* both involved the introduction of conspiracy evidence against co-defendants which clearly might have been considered by the jury with regard to the complaining defendant, who had been acquitted of conspiracy. In *Patrisso*, the Second Circuit concluded that a scanty case against the complaining defendant had been bolstered by an "accumulation of instances during the trial in which testimony inadmissible against [him] was received against others with instructions that it was not to be considered as to [him]." This was prejudicial, particularly because much of the inadmissible evidence implicated no one other than the complaining defendant. *United States* v. *Patrisso*, *supra*, 262 F. 2d at 196–197.* But that is not this case. Here the evidence showing that petitioner aided and abetted others in the possession of the stolen goods was compelling. Indeed, there was no other reasonable explanation for petitioner's con-

in connection with the charges against them under Count I. Obviously, such evidence may not be considered as against Gimelstob, either, as to Count I, for he has been severed. However, you may consider evidence that has been adduced as against Gimelstob with respect to the charges against him contained in Counts III and IV * * * [Tr. 3572]."

*United States v. Kelly, *supra*, is wholly inapposite here, since in that case the defendant had been convicted of conspiracy on "tenuous and unsubstantial" proof, largely because the charge to the jury implied that if any defendant were convicted of conspiracy all must be. *United States* v. *Kelly*, *supra*, 349 F. 2d at 756.

duct in interfering with the F.B.I. agent. Any error in the charge on this point would, therefore, be harmless.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

[7] Petitioner also asserts that the district court erred in advising the jury that he had been "severed," rather than acquitted, of conspiracy. As the court of appeals noted, this contention is "unsupported by legal authority" (Pet. App. 11a).